A Procedure Likely to Remain Rare in the African System

Frans Viljoen 2021-04-27T13:00:12

In the African regional human rights system, very little use has been made of inter-State communications. In this blogpost, I outline this particular kind of communications and analyse the most important case so far, the *'DRC case'*. Subsequently, I consider the reasons for the dearth of inter-State cases, and conclude that an increase in submission of such cases is unlikely on the short term.

Existing Inter-State Communications Under the African Charter

The African regional human rights system is based on the African Charter on Human and Peoples' Rights ('African Charter'). When it was established in 1981, a quasi-judicial body, the African Commission on Human and Peoples' Rights ('African Commission'), was its only supervisory body. With an additional protocol, a judicial body was created and the African Court on Human and Peoples' Rights ('African Court') has been in operation since 2006. An inter-State procedure is provided for explicitly in the African Charter (arts. 47 *et seq*).

Acceptance of inter-State communications is automatic upon adherence to the African Charter. This means that submitting inter-State communications is within the competence of the 54 state parties to the African Charter. None of them has entered a reservation in respect of the relevant Charter provisions. There are two main avenues through which states may submit inter-State communications, either to the African Commission or (directly or indirectly) to the African Court.

To date, no inter-State case has been submitted to the African Court; and the Commission has considered only the following **three inter-State communications**:

- *Democratic Republic of Congo v Burundi, Rwanda and Uganda* (Communication 227/99, the 'DRC case'), in which the Commission in 2003 found a violation by the three respondent states of various provisions of the African Charter.
- *Sudan v South Sudan* (Communication 422/12). In February 2013, the Commission decided not to be seized with this communication.While this decision has not been made public, and was only mentioned in the Commission's 34th activity report, it can be assumed that this was because South Sudan had not at the time ratified the Charter. South Sudan entered its instrument of ratification to the Charter only in October 2013.
- *Djibouti v Eritrea* (Communication 478/14), declared admissible in February 2019, is currently at the merits stage. The admissibility decision, referenced in the Commission's 46th activity report, has also not yet been made public.

Analysis of the *DRC* case

For an inter-State communication to be admissible, the African Charter requires that local remedies be exhausted “if they exist”, unless the procedure to achieve exhaustion would be unduly prolonged (art. 50 of the African Charter). In the *DRC case*, the question of exhaustion of local remedies did not arise since the actions of the respondent states took place in the DRC itself (para. 63). On the substance, the Commission held that the violations of international humanitarian law (IHL) fall within the Commission’s mandate (para. 64), but it did not find a violation of the general rules of IHL as such, but read and interpreted the African Charter, of which violations were found, in the light of IHL.

The DRC situation was also submitted to the International Criminal Court (‘ICJ’). While the African Commission and ICJ proceedings were formally distinct, the ICJ seems to have had an influence: While the Commission decided the *DRC case* on 29 May 2003, its decision was only made public in 2006, after the ICJ had handeddown its judgment on 19 December 2005. Although there is no formal requirement in the African system that the matter cannot be pending before another dispute settlement mechanism, the Commission seems to have been aware of this and took it into account when releasing its own decision. For individual communications, there is an admissibility requirement that a matter is inadmissible before the Commission if it had been *settled*by a similar mechanism of dispute settlement to the Commission (art. 56(7) of the African Charter). This requirement is not applicable to inter-State communications. In any event, if the Commission had applied this rule in this case, it would have had no problem finding the matter admissible, because the matter before the ICJ was, in 2003, *pending* and not yet *settled*.

Another consequence of the *DRC case* being submitted as an inter-State communication under art. 49 of the African Charter is that there is no prerequisite of attempting to reconcile the parties. In this respect, the procedure under art. 49 of the African Charter differs from that under art. 47, which requires the complaining state to allow a period of three months for possible amicable settlement before it may submit the communication to the Commission. Taking heed of the circumstances of the case, the Commission concluded that attempting conciliation would ‘not be diplomatically either effective or desirable’ (*cf.* para. 61) and would therefore be inappropriate.

No individual communications were submitted related to the subject matter in the *DRC case* , despite the massive and widespread nature of violations. Submission to the African Commission of potential cases by individuals in most state parties, including the DRC, has been very infrequent.

To a large extent, the Commission in its fact-finding relied on submissions by the respondent states. The fact that Burundi did not presented any argument or evidence (*cf*. para. 96); and that Rwanda did not take part in the case beyond the admissibility phase (*cf*. para. 97), hampered the ability to arrive at a full and authoritative picture. On the issue of harm by Uganda to the DRC’s natural resources, the Commission found that the state’s averments were reliably contradicted by the Report of the Panel of Experts (para. 92), submitted to the UN Security Council in April 2001.

Due to the delay in deciding the case, the situation has to a large extent resolved itself, leaving the Commission to note the changed circumstances, including the withdrawal of armed forces (*cf*. holding). The Commission also recommended that "adequate reparations" be paid by the three states (*cf*. holding). As with many other decisions of the African Commission, it is unclear to what extent the respondent state has implemented these recommendations. It appears that the debate about the appropriate remedy – at least as far as Uganda is concerned – has "shifted" to the ICJ, where a final determination in the issue is pending.

Assessment

Inter-State complaints may be submitted both to the African Commission and the African Court, by 54 and 31 member states , respectively. These numbers suggest the considerable potential for the submission of inter-State cases. However, only three cases have thus far – in the 35 years since the entry into force of the African Charter – been submitted, all to the African Commission.

The reasons for the dearth of inter-State cases are manifold. One reason for the reluctance of states to complain against other states lies in the general culture of non-intervention that is prevalent in relationship between African states. One of the foundational values of both the Organization of African Unity (OAU) and later on the African Union (AU) is "non-interference by any member state in the internal affairs of another" (art. 4(g) AU Constitutive Act). Another reason is related to the nature of matters that are likely to be referred, which are likely to relate to conflict between states. There are a number of fora to which states can refer such matters, including the AU Peace and Security Council, thus reducing the need for recourse to inter-State complaints.

A further reason is the uninspiring outcome of the single decided inter-State communication, the *DRC case*. A four-year delay between the submission of the matter (in 1999) and the Commission's decision (in 2003) meant that the most pressing circumstances have in fact already been resolved or fundamentally changed by the time of the Commission's decision. The Commission did not request any provisional measures. This is due to the fact that, while the Commission's competence to issue "provisional measures" in respect of individual communications is provided for in the Commission's 2010 Rules of Procedure (Rule 98), there is no similar provision for inter-State cases. An additional four-year delay between the Commission's decision and its publication (in 2006) casts doubt on the factors motivating and guiding the Commission in its decisions. An associated reason is the non-implementation of the Commission's recommendations, as appears from the proceedings before the ICJ. A lack of implementation adds to the sense of disillusionment that may further impede submissions.

A last reason to mention for the small number of inter-State cases in the African human rights system relates to the nature of disputes arising between States. These disputes may relate to issues such as contestation over borders, access to water, and use of force. While States may not consider a human rights court to be an appropriate forum to resolve such disputes, they may be more inclined to submit inter-State cases arising from such circumstances to a court with a more

general international law competence. Such a court is provided for in a revised legal framework establishing an 'African Court of Justice and Human Rights', which is however not yet in force.

Against the backdrop of these manifold reasons, it seems unlikely that there will, in the near future, be a dramatic increase in the use of the inter-State mechanism in Africa.
